

STATE OF MICHIGAN  
COURT OF APPEALS

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In the Matter of M. R. J. BURT, Minor.

UNPUBLISHED

May 20, 2014

No. 318282

Eaton Circuit Court

Family Division

LC No. 10-017763-NA

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Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

WHITBECK, J. (*concurring*).

I concur in the majority's opinion, but write separately to indicate that, even if *In re Mason*<sup>1</sup> is relevant, it is distinguishable from the facts in this case.

In *Mason*, the Michigan Supreme Court held that the inability of a parent to care for his or her children because of incarceration is not, alone, grounds for termination.<sup>2</sup> There are some clear parallels between *Mason* and this case: Burt is an incarcerated parent, Burt attempted to comply with his service plan, there is a short time until Burt's earliest release, and Burt's child is placed with his relatives. But I conclude that *Mason* is distinguishable for two reasons.

First, the state did not deprive Burt of a meaningful opportunity to participate in the proceedings. In *Mason*, the Department did not even provide the respondent with a case service plan or attempt to contact him.<sup>3</sup> Here, Burt actively participated in hearings by phone. The caseworker advocated for involving Burt in services, and one caseworker attempted to secure Burt additional services while he was in prison. The caseworker and trial court actively attempted to preserve Burt's bond with the child by allowing phone visitations. Also, Burt stated that he no longer wanted to be contacted by the Department, and ceased contact between November 2012 and April or May 2013. Thus, here, the state did not deprive Burt of his opportunity to participate in the proceedings. The trial court here, unlike the court in *Mason*, was able to consider and evaluate Burt's progress.

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<sup>1</sup> *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010).

<sup>2</sup> *Id.* at 161.

<sup>3</sup> *Id.* at 156-158.

Second, the trial court did not fail to consider the children's placement with relatives or the possibility of a short term, voluntary placement. In *Mason*, the trial court failed to consider whether the respondent could properly care for his children by placing them with relatives.<sup>4</sup> Here, the trial court *did* explore the possibility of Burt voluntarily placing his children with his relatives. It considered the children's placement against relatives and how that weighed against termination. However, the trial court also considered that the relatives did not want a temporary custody arrangement. Thus, the trial court did not fail to consider, as the trial court did in *Mason*, whether Burt could provide for his children with a temporary custody arrangement.

I conclude that, in *Mason*, the Michigan Supreme Court held that the trial court erred by failing to weigh and consider several mitigating factors, including the children's placement with relatives and the Department's failure to provide reasonable efforts to reunify the children with the respondent. This case is distinguishable because, here, the trial court considered these factors but still concluded that the Department clearly established grounds for termination. I am not definitely and firmly convinced that the trial court made a mistake. I conclude that the trial court properly found that the Department established MCL 712A.19b(3)(g) by clear and convincing evidence.

I would affirm on these grounds as well.

/s/ William C. Whitbeck

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<sup>4</sup> *Id.* at 160-164.